Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-1544

RICHARD A. BOEHNING, individually and as Chairman Commissioner of the Indiana State Highway Commission,
JAMES S. DUMAS, individually and as Vice Chairman Commissioner of the Indiana State Highway Commission,
KERMIT GREGORY, individually and as Commissioner of the Indiana State Highway Commission,
HAROLD O. MCCUTCHAN, individually and as Commissioner of the Indiana State Highway Commission,
R. H. HARRELL, individually and as Executive Director of the Indiana State Highway Commission,
ROLAND L. KILLEBREW, individually and as Chief, Personnel Division of the Indiana State Highway Commission,
NICHOLAS VAN NDELEN, individually and as District Engineer of the Indiana State Highway Commission, and
ALBERT SCHLESSELE, individually and as Subdistrict Superintendent of Subdistrict 6-62 of the Vincennes District Highway Commission,

Petitioners,

vs.

INDIANA STATE EMPLOYEES ASSOCIATION, INC. an Indiana not-for-profit corporation, and PHYLLIS A. MUSGRAVE, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Donald R. Anderson
Ronald E. Elberger
1100 First Federal Building
Indianapolis, Indiana 46204
(317) 637-5353

Attorneys for Respondents

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division (herein-

BEST COPY AVAILABLE

after District Court) (Petition A-11), is reported at 357 F.Supp. 1374 (S.D. Ind. 1974). The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) (Petition, A-11) is reported at 511 F.2d 834 (7th Cir. 1975).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The following statement of questions presented is set forth solely to clarify the issues which were adjudicated by the courts below. Respondents do not believe that the restated, clarified issues warrant review of the judgment and opinion of the Seventh Circuit.

1. Whether, in a civil rights action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), the Seventh Circuit correctly held that abstention by the District Court was inappropriate where:

   a. There were no unsettled questions of state law presented;

   b. There were no allegations which challenged the constitutionality of any state law;

c. There was no impairment of any state functions; and

d. There was no adequate state remedy?

2. Whether the Seventh Circuit correctly held, under the principles set forth in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), that Section 6 of the Indiana State Highway Commission Bipartisan Personnel System Act (hereinafter Act) supports a legitimate claim of entitlement to public employment which requires that state highway employees covered by the Act receive notice and hearing prior to discharge?

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States, and of the Act, IC 1971, 8-13-1.5-1 and 8-13-1.5-5 and 8-13-1.5-6 are set forth in the Petition at pp. 3-5.

Statement of the Case

This action was instituted in the District Court pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1343(3) and (4), 2201 and 2202 by the Indiana State Employees Association, Inc., a labor organization, and Phyllis A. Musgrave (hereinafter Plaintiffs),

challenging the discharge of Plaintiff Musgrave from her employment as a stockroom clerk with the Indiana State Highway Commission (hereinafter Commission). The Defendants were the members and officials of the Commission as well as the Executive Director, Chief of Personnel, a District Engineer, and a Subdistrict Superintendent (Scheessele) of the Commission.

Plaintiff Musgrave, a member of the Indiana State Employees Association, Inc., began her employment with the Commission on or about January 19, 1970, and as a Commission employee became subject to the terms and provisions of the Act regarding discharge. On or about February 5, 1973, Plaintiff Musgrave was informed by Defendant Scheessele that her employment with the Commission would be terminated effective February 13, 1973. Plaintiff Musgrave thereafter demanded that a due process pretermination administrative hearing be held which the Commission denied. The particular reasons for Plaintiff Musgrave's discharge are in dispute. Defendants claimed that Plaintiff Musgrave was fired for cause in response to which Plaintiff Musgrave stated that the particular reasons were not sufficient to amount to cause under the Act. It is stipulated that Plaintiff Musgrave's political affiliation is not at issue and that the employee who replaced Plaintiff Musgrave is affiliated with the same political party as Plaintiff Musgrave.

Plaintiffs filed their Complaint on March 6, 1973, as a class action, for a declaratory judgment, injunction, damages and attorneys fees, alleging that Plaintiff Musgrave was entitled to notice and a pre-termination hearing under Section 6 of the Act before her discharge. Defendants took the position that no hearing need be held upon the request of any employee covered by the Act prior to the dismissal of such employee. Plaintiffs did not challenge the constitutionality of the Act. Accompanying their Complaint Plaintiffs filed a Motion for Temporary Restraining Order with a supporting Memorandum and Affidavits. On March 7, 1973, after a hearing, the District Court denied that Motion. On March 20, 1973, the Defendants filed their Motion to Dismiss with supporting Memorandum, in opposition to which Plaintiffs filed a Memorandum of Law on March 23, 1973.

On April 2, 1973, pursuant to Rule 65 (a)(2), Federal Rules of Civil Procedure, the hearing on the preliminary injunction was consolidated with a trial on the merits.

The matter was fully tried before the District Court on April 2, 1973, most of the facts having been previously stipulated by the parties. The District Court then took Defendants' Motion to Dismiss under advisement, and granted the Defendants permission to file an Answer which was filed on April 4, 1973, and took the entire case under advisement.

On April 13, 1973 the District Court entered its Opinion and Order abstaining from deciding the merits of the case until the Courts of the State of Indiana had had an opportunity to determine whether Plaintiff Musgrave had a right to a pre-termination hearing under Indiana law, 357 F.Supp. at 1378. The District Court did not rule on the class action allegations and denied Plaintiffs' request for attorneys' fees.

A timely appeal was filed in the Seventh Circuit, and on March 10, 1975, that Court held that the District Court should not have abstained, and reached the merits, stating that:

> "Where, as here, no such substantial question as to the applicable state law can be identified, 'abstention is equivalent to an impermissible requirement of exhaustion of state remedies.' . . . The right to a hearing under the federal constitution is the question presented in this action, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court. Under these circumstances, abstention by a federal court is inappropriate.
>
> "The matter was fully tried before the district court decided to abstain. The facts are almost entirely stipulated. The parties have briefed and argued here the

> merits question whether plaintiff Musgrave had the type of interest in her employment so that her dismissal without a hearing was a denial of due process. Since there are no unresolved issues of fact relating to this question of law, we think it appropriate to decide it here." (Petition, A-5)

Additionally, the Seventh Circuit concluded that the Act "sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's" (Petition, A-7), "under the principles stated in Roth and Sindermann" (Petition A-8), "whose discharge is not based on political affiliation under Sec. 5" (Petition, A-9) of the Act. The Seventh Circuit then held that Plaintiff Musgrave was entitled to notice and a hearing before discharge, ordered Plaintiff Musgrave reinstated, and remanded the case to the District Court to determine if the Defendants were liable individually for damages. The Seventh Circuit expressed no opinion on the class action allegations and affirmed the denial of attorneys' fees.

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED NOR IS THERE A CONFLICT OF DECISION

A

Abstention Generally

Abstention is inappropriate in a civil rights action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4) where (a) there are no unsettled questions of state law presented; (b) there is no constitutional challenge to the validity of any state law; (c) there was no impairment of any state functions; and (d) there was no adequate state remedy. Plaintiff's action below sought a determination as to whether, under the principles enunciated in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), Section 6 of the Act supported a legitimate claim of entitlement to public employment which required the Defendants to provide notice and grant an administrative hearing to state highway employees covered by the Act prior to the discharge of such state highway employees. Petitioners failed to designate any area of doubtful meaning or to outline any arguable construction of the Act which would, as a matter of state law, entitle the plaintiffs to a hearing or to provide a remedy for a lack of one. Additionally, petitioners stipulated that there is no challenge to the constitutionality of the Act (Petition, 5, 9). Further there is no pending state court case which presents the constitutional issue presented to the district court, or which would avoid the necessity of deciding the constitutional question.

Under these facts and circumstances, federal jurisdiction may not be declined merely because federal rights may be asserted and vindicated in some other forum. McNeese v. Board of Education, 373 U.S. 668, 672 (1962). Clearly, abstention "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy" absent "special circumstances," Propper v. Clark, 337 U.S. 472, 492 (1949), none of which are presented in the case at bar. As observed by the Honorable Wilbur F. Pell, Jr., in his article "Abstention--A Primrose Path By Any Other Name," 21 DePaul L. Rev. 926, 982-3 (1972):

"As correctly stated in Wright v. McMann, 'it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention.' Where other types of cases may fall will be dependent to a considerable extent upon a current analysis of the public weal significance.

"The duty of the federal court, at least in the area of civil rights, has been clearly set forth in an often quoted statement of Mr. Justice Douglas in McNeese v. Board of Education.

'We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt

to vindicate the same claim in a state court. The First Congress created federal courts as the chief--though not always the exclusive--tribunals for enforcement of federal rights.'"

Section 1983 actions, as that before this court, "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," Mitchum v. Foster, 407 U.S. 225 (1972). Certainly, abstention is not to be applied automatically in such actions, Baggett v. Bullitt, 377 U.S. 360, 375 (1964), especially where a state remedy, though adequate in theory, is not available in practice, Monroe v. Pape, 365 U.S. 167, 174, 183 (1961).

B

Unsettled Questions of State Law

Although the Defendants assert that the Seventh Circuit should have abstained from deciding the issue of whether a right to notice and pretermination hearing exists under Section 6 of the Act, the Defendants conspicuously fail to identify or specify any areas of doubtful meaning or to outline any arguable construction of the Act which would, as a matter of state law, entitle the plaintiffs to a hearing or to provide a remedy for a lack of one. The only contention raised by the Defendants is that the statute is "capable of being

interpreted in more than one way." (Petition, 9). However, Defendants fail to identify any ambiguous statutory interpretation; in fact, the Defendants meekly admit that "[s]uch interpretation might be that the State statute does create the requirement requested," thereafter claiming that, as a matter of "courtesy," the State courts should be allowed to make such a determination. (Petition, 9).

Contrary to Defendants' assertion, "[a]bstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." Zwickler v. Koota, 389 U.S. 241, 251 (1967). "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, supra, 365 U.S. at 183. Decidedly, "where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

Defendants erroneously rely upon Askew v. Hargrave, 401 U.S. 476 (1971) to support abstention in the instant case. If anything, Askew identifies the weakness of Defendants' reliance. In Askew, a state court proceeding was filed subsequent to the filing of the federal action challenging a state statute on state constitutional grounds. Thus, Askew presented a situation

of a pending state court case raising "primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question." 401 U.S. at 478. Comparatively, in the case before this Court, no state action is pending nor is the constitutional validity of any state statute challenged.

Similar in infirmity is defendants' reliance upon Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) wherein the constitutionality of a law of the Commonwealth of Puerto Rico was challenged. Abstention was ordered to provide the Puerto Rican Supreme Court the opportunity to authoritatively construe a "rather vague Puerto Rican law." 400 U.S. at 43. Comparing Fornaris to the instant case, it is evident that (a) there is no vague state law presented for construction, and (b) no constitutional attack has been made against the Act.

Defendants have also misplaced reliance upon Reetz v. Bozanich, 397 U.S. 82 (1970) wherein nonresidents of Alaska challenged the constitutionality of certain state fishing laws on both state and federal constitutional grounds. Abstention was ordered since ". . . the nub of the whole controversy may be the state constitution," whose provisions had never been interpreted by an Alaska court, and which dealt with ". . . that same unique resource, the management of which is a matter of great state concern." 397 U.S. at 86-87. Reetz, notably, reiterated the admonition of Zwickler v. Koota,

supra, that abstention was applicable "only in narrowly limited 'special circumstances'" where "the issue of state law is uncertain."

Conclusively, the Askew-Fornaris-Reetz trilogy is inapplicable to the case at bar. Each case challenged the constitutionality of a state law, although no such challenge is presented in the case before this Court. Askew involved a pending state proceeding raising similar claims as that of a pending federal action. In the case at bar, there is no pending state action. Fornaris involved a "vague" law, while the Defendants before this Court have failed to identify any vagueness or ambiguity in the construction of the Act to avoid resolution of the underlying Roth-Sindermann issue. As succinctly stated in Harman v. Forssenius, 380 U.S. 528, 535 (1965):

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. . . . Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.'"

Comparable to McNeese, "[t]he right alleged is as plainly federal in nature and origin as those vindicated in" Roth and Sindermann, nor is the Roth-Sindermann federal right to notice and pretermination hearing "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." 373 U.S. at 674. Notably, Defendants have failed to show any such concept of entanglement. All that is advocated by the Defendants is that state tribunals should have the first "opportunity to consider complex statutes" (Petition, 9), although as occurred in Harman, supra, 380 U.S. at 536.

> ". . . the State does not point to any provision in the legislation which leaves 'reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutionaly adjudication, or at least materially change the nature of the problem.' Harrison v. NAACP, 360 U.S. 360 U.S. 167, 177, 3 L. ed. 2d 1152, 1158, 79 S. Ct. 1025."

which led to rejection of such argument as having "little force."

Accordingly, it is evident that the Seventh Circuit correctly held that abstention by the District Court was inappropriate in the absence of any constitutional challenge to the validity of a state law, and in the absence of any vague or ambiguous state statutory construction of the Act in question.

C

Federal-State Friction

The sole basis of Defendant's argument, weak and strained as it may be, is that the Seventh Circuit, in determining that Plaintiff Musgrave possessed a legitimate claim of entitlement to public employment under Section 6 of the Act, which in turn requires notice and hearing prior to discharge, determined the "rights" of hundreds of state employees to notice and pretermination hearings covered by a "valid state statute. . . which the state courts have never had the opportunity to interpret," thereby creating federal-state friction. (Petition, 12). The absence of support for Defendants' position is highlighted by their misplaced reliance upon Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941) and Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y. 1971).

In Kiernan plaintiffs challenged the constitutionality of the no-strike provisions of the state civil service law, thereby distinguishing it from the case at bar where Plaintiffs do not seek to have any state statute declared unconstitutional; in fact, Plaintiffs support the Act and request that there be notice and an administrative hearing regarding the appropriateness of a discharge pursuant to Section 6 of the Act.

Pullman, too, involved a constitutional attack against an order of the Texas Rail-

Road Commission accompanied by a claim that the Commission's order was unauthorized under state law. The absence of a constitutional challenge to the Act before this Court readily distinguishes Pullman from the case at bar. Indeed, in Pullman the Court observed that "[i]f there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority." 312 U.S. at 501.

Without referring to any available state remedy, assuming arguendo that one even existed, Defendants are merely seeking, behind a guise of federal-state friction, to give state courts the first opportunity to adjudicate a Roth-Sindermann federal claim. This position is not only untenable, but at best is decidedly misleading and inappropriate under the facts and circumstances of this case, especially after the matter has been fully tried on the merits before the District Court. Conclusively, abstention by the District Court was inappropriate. Zwickler v. Koota; Wisconsin v. Constantineau; Monroe v. Pape; Harman v. Forssenius, supra.

D

Impairment of State Functions

Although adept at affixing appellations to argumentation, Defendants still flounder

without support for their position that the exercise of federal jurisdiction in this case brings the federal judiciary into conflict with a state's administration of its own affairs, thereby impairing state functions (Petition, 13). Defendants erroneously rely on yet another case which challenged the constitutional validity of a state law permitting annexation of school districts and assumption of bond indebtedness, Detroit Edison Co., v. East China Township School District No. 3, 378 F.2d 225 (6th Cir. 1967), wherein the Court held that ". . .abstention is particularly appropriate in this case since the assumption proceeding allegedly failed to conform to state law and since certain sections of the school code pursuant to which the proceedings were conducted allegedly contravened the state constitution." 378 F.2d at 230.

Equally as infirm is Defendants' reliance upon Martin v. Creasy, 360 U.S. 219 (1959) where plaintiffs challenged the constitutional validity of a state law which allegedly did not provide compensation for loss of access to a planned highway. Martin, however, presented the additional distinguishing feature of a pending state court proceeding and procedure to guard and protect the plaintiffs' constitutional rights. None of the factors present in Martin are present in the case before this Court.

Plaintiffs emphasize that they have not challenged the constitutional validity of

Section 6 of the Act. Rather, Plaintiffs seek to enforce their federal constitutional claim, under the principles of Roth and Sindermann, to notice and a pretermination hearing under the Act. In this regard, the Seventh Circuit correctly performed its "duty" to order the District Court to exercise its properly invoked jurisdiction. Baggett v. Bullitt, 377 U.S. at 375-379; Harman v. Forssenius, supra.

Since there is no conflict of decision regarding the abstention issue, and in view of the fact that the abstention issue in cases of this nature has been settled by this Court as hereinbefore set forth, and since the Seventh Circuit correctly followed this Court's abstention decisions, the petition for writ of certiorari should be denied.

II

THE SEVENTH CIRCUIT CORRECTLY HELD THAT, UNDER THE PRINCIPLES ENUNCIATED IN ROTH AND SINDERMANN, SECTION 6 OF THE ACT SUPPORTS A LEGITIMATE CLAIM OF ENTITLEMENT TO PUBLIC EMPLOYMENT WHICH REQUIRES THAT STATE HIGHWAY EMPLOYEES COVERED BY THE ACT RECEIVE NOTICE AND HEARING PRIOR TO DISCHARGE

Section 6 of the Act provides:

"Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter cause shall be any action or

inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the State of Indiana. Cause may include but shall not be limited to the following:

Intoxication on the job, physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies."

As the Seventh Circuit correctly observed, Section 5 of the Act, "which authorizes dismissal of employees on account of their political affiliation for the purpose of achieving a balance of the proportion of employees adhering to different political parties" (Petition, A-7,8), is not applicable to the case at bar since the Defendants have stipulated that Plaintiff Musgrave's political affiliation is not at issue and that the employee who replaced Plaintiff Musgrave is affiliated with the same political party as the Plaintiff (Petition, A-6). Accordingly, Defendants'

reliance on a patronage argument (Petition, 16) is not only improper but unduly deceptive.

In light of Roth and Sindermann, the Seventh Circuit, after a full trial on the merits was held in the District Court, correctly addressed itself to the issue of whether the Act conferred a legitimate claim of entitlement to Plaintiff Musgrave's continued public employment so as to require notice and hearing prior to dismissal. As Roth held:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests--may take many forms." 408 U.S. at 576.

To have a property interest protected by procedural due process, a person must "have a legitimate claim of entitlement to it." 408 U.S. at 577. As correctly observed and applied in this case by the Seventh Circuit, quoting Roth:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Emphasis supplied)

Clearly, a statutory provision for the continuance of public employment absent misconduct as provided in section 6 of the Act gives rise to the "claim of entitlement" to the job, which in turn gives rise to the due process and equal protection rights entitling the employee to notice and hearing on whether the specified statutory conditions have occurred. As the Court pointed out in Roth:

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 119, 91 S. Ct. 780. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." Bell v. Burson, 402 U.S. 535, 542, 29 L. Ed. 2d 90, 96, 91 S. Ct. 1586. 408 U.S. at 570 (fn. 7).

Thus, proof of the legitimacy of a claim of entitlement to public employment "would

obligate . . . officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." Perry v. Sindermann, supra, 408 U.S. at 603. Having correctly followed the decisions of this Court, the Seventh Circuit held that:

> "We conclude that the Indiana State Highway Commission Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment of employees in positions similar to plaintiff's. Section 6 of the Act authorizes dismissal for cause, and described the type of conduct which constitutes cause.
>
> "The specification of authority to discharge for two types of grounds in Secs. 5 and 6 of the Act clearly implies exclusion of other grounds. In our judgment the limitation to these two types of grounds are sufficient to support a claim of entitlement under the principles stated in Roth and Sindermann. This surely must be true in the case of an employee whose discharge is not based on political affiliation under Sec. 5. It follows that plaintiff Musgrave was entitled to notice and hearing before discharge." (Petition A-6-9).

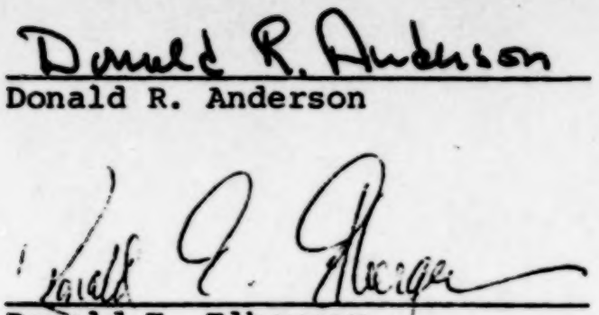
The decisions of this Court and of the Seventh Circuit are in accord. Indeed,

decisions in other circuits similarly support the decision of the Seventh Circuit in the case at bar. In Mondell v. Mayor and City Council of Baltimore, 356 F. Supp. 76, 77 (D.Md. 1973) where Section 118 of the Baltimore City Charter provided that an employee may be discharged for "cause" but no hearing was provided for, the court found that the word "cause" gave rise to an entitlement which required a pretermination administrative hearing. Similarly, legislative protection under the Veterans' Preference Act has been held to constitute entitlement sufficient to invoke due process protections for a person in the "excepted service" (i.e. outside the scope of the Civil Service Rules and Regulations) when their position was "eliminated" by the Air Force in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). See, also, Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972), cert. den. 411 U.S. 967 (1973).

In the absence of any conflict of decision, none of which have been designated by the Defendants, and in view of the Seventh Circuit's correct application of the principles enunciated in Roth and Sindermann, the petition for writ of certiorari should be denied.

Conclusion

For the reasons hereinbefore set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.



Donald R. Anderson

Ronald E. Elberger

1100 First Federal Building
Indianapolis, Indiana 46204
(317) 637-5353

Attorneys for Respondents